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Defective Design: Wisconsin's Limitation of Action Statute for Architects, Contractors and Others Involved in Design and Improvement to Real Property

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COMMENT

DEFECTIVE DESIGN — WISCONSIN'S LIMITATION OF ACTION STATUTE FOR ARCHITECTS, CONTRACTORS AND OTHERS INVOLVED IN DESIGN AND IMPROVEMENT TO REAL PROPERTY

Largely because of strong lobbying efforts by contractors and architects,[1] over forty states,[2] including Wisconsin, have enacted special statutes of limitation designed to bar claims against those who perform or furnish the design, planning, supervision or construction of improvements to real property. Under these statutes the period of limitation commences with the completion of an improvement to real property.[3] Although "completion" statutes were designed to alleviate problems believed to be endemic to architects and contractors, it now appears that they may overstep constitutional guarantees in a number of respects. Indeed, Wisconsin's first completion statute was found to be a denial of equal protection soon after its enactment.[4] Although the Wisconsin Legislature has amended and reenacted the original completion statute,[5] it appears likely this statute will also meet with constitutional invalidation.[6]

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1. *See* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 CATH. U.L. REV. 361 (1968-69) [hereinafter cited as *Limitation of Action Statutes for Architects and Builders*].

2. J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 734 (2d ed. 1977). Knapp, *Application of Special Statutes of Limitations Concerning Design and Construction*, 23 ST. LOUIS U.L.J. 351 (1979) [hereinafter cited as *Statutes of Limitations Concerning Design and Construction*].

3. WIS. STAT. § 893.155 (1977).

4. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1974). Similar statutes in seven other jurisdictions have also been invalidated. Alabama, Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975); Hawaii, Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Illinois, Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); Kentucky, Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Minnesota, Pacific Indem. Co. v. Thomas-Yeager Inc., 260 N.W.2d 548 (Minn. 1978); Oklahoma, Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); South Carolina, Broome v. Trulucki, 270 S.C. 227, 241 S.E.2d 739 (1978). (Michigan's court of appeals found their statute unconstitutional and the case is presently pending before the state supreme court. Muzar v. Metro Town Houses, Inc., 82 Mich. App. 368, 266 N.W.2d 850 (1978)).

5. WIS. STAT. § 893.155 (1977).

6. *But see Statutes of Limitations Concerning Design and Construction, supra* note 2, at 364, stating that the new completion statute cured its predecessor's defects.

The purpose of this comment is to trace Wisconsin's experience with its completion statute, delineate the policy considerations favoring and opposing such a statute and determine whether the state's new completion statute will withstand constitutional challenges. In addition, this comment will examine the law as it existed subsequent to the invalidation of Wisconsin's first completion statute but before the adoption of the state's second completion statute. This inquiry is crucial because cases decided during this interim period may once again become controlling law if the current statute is also found to be unconstitutional. Finally, this comment will propose a statute which, it is asserted, will withstand equal protection and due process assaults while contemporaneously providing for the special needs of those who furnish or design improvements to real property.

I. Accrual or Completion?

Prior to the enactment of Wisconsin's first completion statute, injuries to property were governed by a six-year limitation period which ran from the accrual of an action.[7] A cause of action accrues when there "exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it."[8] For a negligence action to accrue there must be a negligent act or omission, causation and injury.[9] Although accrual statutes are a common and seemingly workable system of limitations, they are readily susceptible to criticism.

The primary difficulty with an accrual statute is that a builder or architect can be subjected to liability many years after the completion of construction. This "long-tail" problem arises because the period of limitations under an accrual statute does not begin to run until there has been an injury to property. An injury exists if it is "sufficiently significant" to put a plaintiff on notice. This definition of an injury poses a formidable problem of proof for defendants.

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7. Wis. Stat. § 330.19(5) (1961). In Wisconsin, a statute of limitations is not merely a statute of repose, but one which creates and extinguishes rights. Maryland Cas. Co. v. Beleznay, 245 Wis. 390, 393, 14 N.W.2d 177, 179 (1944).

8. Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 754, 168 N.W.2d 177, 179 (1968).

9. Peterson v. Roloff, 57 Wis. 2d 1, 8, 203 N.W.2d 699, 703 (1972).

The "long-tail" and notice of injury problems are aptly illustrated by the facts in *Abramowski v. Wm. Kilps Sons Realty, Inc.*,[10] which involved an action against a builder who had constructed a home for plaintiffs' predecessors in title. The defendant had completed construction in 1962. In 1974, three years after plaintiffs had purchased the home, the foundation caved in. The Wisconsin Supreme Court held that no action had accrued until 1974, the year in which the injury to property had occurred.

As the above facts demonstrate, a defendant under an accrual statute can be subjected to liability after an indefinite period of time. Although the builder in *Abramowski* had completed construction in 1962, the foundation did not cave in until 1974 — twelve years after completion of construction. The original owners had sold the home four years earlier and it was the subsequent owners who brought suit.[11] The original owners may have had relevant evidence, but their presence could not be secured for trial. The other concern, the difficulty in determining when plaintiffs have sufficient notice of their injury to bring a claim, is the other side of the coin of the "long-tail" problem. The claim in *Abramowski* had not been brought until the foundation had caved in. Had there been water in the basement before this? Were there cracks in the walls or basement floor? Had plaintiffs' predecessors in title known of the defect? Under an accrual statute it would be difficult, if not nearly impossible, for a defendant to ascertain facts relevant to these crucial inquiries.

Perhaps in an attempt to eliminate the "long-tail" and notice of injury problems, the Wisconsin Legislature adopted the state's first completion statute.[12] This statute defined two dis-

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10. 80 Wis. 2d 468, 239 N.W.2d 306 (1977).

11. Wisconsin, like many jurisdictions, now recognizes that a third party need not have privity to bring suit in such cases. *See, e.g.*, A.E. Investment Corp. v. Link Builders, Inc., 62 Wis. 2d 479, 214 N.W.2d 764 (1973) (architects); Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961) (builders). *See also* RESTATEMENT (SECOND) OF TORTS § 385 (1965).

12. Wisconsin's first completion statute was adopted in the following form:

> **893.155 Within 6 years.** No action to recover damages for any injury to property, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or fur-

tinct times from which the bringing of an action was to be measured. As to persons involved in the design, planning or supervision of construction, the period ran from the time of completion. As to persons in control of the premises, such as owners, the statute did not apply and the time period did not run from the time of completion but from the time the cause of action accrued.[13]

In addition to the elimination of the "long-tail" and notice of injury problems, a number of policy considerations have been advanced in favor of a special statute of limitations for builders and architects. First, it has been urged that evidentiary difficulties demand that special protection be accorded

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nishing the design, planning, supervision of construction or construction of such improvement to real property, more than 6 years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

WIS. STAT. § 893.155 (1971).

The history behind the adoption of completion statutes is discussed in *Limitation of Action Statutes for Architects and Builders, supra* note 1, at 361.

13. The operation of this statute is illustrated by the facts in Cohen v. Towne Realty, 54 Wis. 2d 1, 194 N.W.2d 298 (1971), which involved an action by tenants against the owner-manager of an apartment building in which plaintiffs had suffered an injury in a fire. Five months after the plaintiffs filed their original action, the defendants filed a third-party complaint against the architect alleging negligent design and supervision. By the time the defendant had filed the third-party complaint, however, more than six years had passed since the completion of the architectural services, although had the plaintiffs originally joined the architects, or had the defendant acted sooner, the time would not have expired. Assuming, arguendo, that the architects in *Cohen* had actually been responsible for the defective design, the completion statute permitted the Cohens, as tenants, to bring suit against the owner since the completion statute excepted such defendants. Even if plaintiffs had delayed another five months as did the owners, their suit would not have been barred. However, when the defendant-owner attempted to join the party responsibile for plaintiff's injury, he was barred by the completion statute.

As the above example suggests, the distinction between patent and latent defects is crucial under a completion statute. Patent defects are those which are apparent by reasonable inspection. Under an accrual statute, it was unnecessary to distinguish between patent and latent defects since the limitations period did not begin to run until there was an injury. However, when the legislature adopted a completion statute without distinguishing patent and latent defects, there were at times harsh consequences. As to patent defects, the completion statute merely defined the time for bringing claims; but as to latent defects that were not apparent until the time defined by the statute had run, the right to bring suit was cut off before an action had even accrued. It is this latter effect to which the courts have objected.

architects and builders. In *Howell v. Burk*,[14] the New Mexico Supreme Court, while admitting that a completion statute treats classes differently, claimed that the justification for this was that "there is a difference in the problems of defending such claims. Architectural plans may have been discarded [and] copies of building codes in force at the time of construction may no longer be in existence . . . ."[15] Moreover, maintenance over the years may cause stress and strain to an improvement. A builder's or architect's lack of knowledge or control over such upkeep can only exacerbate the problems of proof with which he is already faced.

A second, closely related reason advanced for these special statutes is the lack of access and control by defendants.[16] As it is the landowner or tenant who is in control, and thus in a position to prevent deterioration, policy should favor shifting the burden of compensating injuries to these individuals. Further, an "owner or tenant may permit unsafe conditions to develop, or use the premises for a purpose for which it was not designed, or make defective alternations which may appear to be a part of the original construction."[17]

A third justification derives from the time factor involved. Because latent defects can go undetected for long periods, policy demands a point in time at which defendants should no longer be concerned with liability. Closely related to this consideration is the "desire to relieve [courts] of the burden of adjudicating inconsequential or tenuous claims."[18]

Economic factors must also be considered. The legislature, determining one industry better able to shoulder the burden than another, may decide to shift the economic loss to landowners rather than architects or contractors. Since landowners may procure insurance, arguably they can protect their interests more readily than members of the favored class.

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14. 90 N.M. 688, 568 P.2d 214 (1977).

15. *Id.* at __, 568 P.2d at 520. The New Mexico completion statute is N.M. STAT. ANN. § 23-1-26 (1953).

16. *See Statutes of Limitations Concerning Design and Construction, supra* note 2, at 355.

17. 90 N.M. at __, 568 P.2d at 220.

18. Note, *Development in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1949-50) (citations and footnotes omitted). *See also id.* at 1204 wherein the author discusses statutes of limitation in respect to inherently unknowable harm.

In contrast to the policy reasons supporting the completion statute, parallel considerations exist which seem to demand that the favored class be given no special treatment. While special treatment has been justified on the basis of evidentiary problems, landowners and others in control may be similarly disadvantaged. In fact, because these defendants may not have had possession of or access to architectural plans, they may be additionally disadvantaged.

The argument that builders and architects might be disadvantaged by an owner's alterations to the property confuses the distinction between actions based on strict liability and negligence actions. Once a builder or architect has completed work, the owner or other person making unsafe alterations is solely responsible for the work he has done. The builder or architect is subject to liability only with respect to his original performance. While subsequent alterations may obfuscate the issue of causation, this appears to be an insufficient basis for absolving the more responsible party from all liability.

While it may be desirable to establish a point after which a builder or architect will no longer be liable, the "long-tail" problem is not nearly as nefarious as it is made out to be. The passage of time will likely increase evidentiary difficulties for plaintiffs and defendants alike. Moreover, the evidentiary problem may well be more acute for plaintiffs, who must, after all, establish fault on the part of a defendant. Thus, the mere passage of time is not likely to disadvantage a defendant any more than it does a plaintiff.

Completion statutes have also been justified as a legislative attempt to ease the burden on the judiciary. While unburdening courts is a legitimate legislative goal, the completion statute fails to accomplish this end. An injured tenant, for example, could initiate a suit against his landlord; the completion statute would not bar the suit, but it might bar the landlord from getting indemnification if the tenant's injury resulted from the negligence of a member of the protected class.[19] Thus, while a court action progresses, the statute works only to bar the trier of fact from completely attributing fault to the responsible party. Additionally, a completion stat-

19. *See, e.g.*, Cohen v. Towne Realty, 54 Wis. 2d 1, 194 N.W.2d 298 (1971).

ute is not necessary to protect builders and architects from unfounded claims. In Wisconsin, a party who initiates a frivolous suit can be subjected to liability for attorney's fees and costs.[20] With this kind of protection from frivolous claims, it would seem reasonable that parties should not fear that they will be called on to defend claims which lack a real foundation for potential liability.

Finally, economic considerations, when examined within the context of the statute, do not always result in transferring a burden to one better able to shoulder the cost. In one case, the owner may be a large real estate developer, while in another, the owner may be an individual owning but a single property; or, in another example, the statute would not differentiate a large supermarket chain from a local "mom and pop" grocery store. While some defendants could well afford to absorb the shifted burden, others will undoubtedly be unable to do so. Another economic factor concerns the ability of landowners to protect themselves with insurance. However, architects and builders may also protect themselves. The cost of their insurance, moreover, would be passed on to those who benefit from their services. By requiring this class to continue to shoulder these costs, the burden is placed on the enterprise which is in the best position to prevent such losses initially. It can even be argued that a completion statute which wipes aside all liability after a stated number of years from the date of performance discourages rather than encourages preventative design and care. One commentator has further argued that the law should seek to compensate victims rather than to protect enterprises.[21] This is a particularly telling argument in light of the manner in which the earliest completion statutes were enacted. Since architects were represented by lobbying groups,[22] it would behoove the legislature to closely examine any policy statement favoring this class.

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20. WIS. STAT. § 814.025 (1977). *See e.g.*, Wisconsin v. Johnson, No. 32572 (Cir. Ct., La Crosse, 1979) ($6000 fine awarded).

21. J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS, at 824 (2d ed. 1977).

22. *Limitation of Action Statutes for Architects and Builders, supra* note 1, at 365-66.

II. CONSTITUTIONAL CHALLENGES

In light of the foregoing considerations, it is not surprising that Wisconsin's first completion statute was soon challenged on constitutional grounds. The difficulty with the statute, of course, was its protection of a specific class of defendants excluding owners and tenants. After sidestepping the issue in two early cases,[23] the Wisconsin Supreme Court finally addressed the statute's constitutional infirmities in *Kallas Millwork Corp. v. Square D Co.*[24]

Kallas Millwork had occupied property adjacent to defendant, Square D. Sometime between 1945 and 1952, I.T.T. Grinnell Corporation installed a high-pressure waterline on Square D property. In 1968, the waterline ruptured causing substantial damage to plaintiff's adjacent property. Kallas brought suit against Square D and Grinnell alleging negligent installation of the water system. Grinnell demurred on the basis that the limitation period had run under the completion statute. The trial court overruled the demurrer on the ground that there was an issue as to whether a fire protection system was an improvement to real property under section 893.155, the state's completion statute. On appeal, the supreme court found that a fire protection system was an improvement as a matter of law; as a result, section 893.155 would supposedly bar the claim. Once again an owner of property would have been subject to suit without ability to obtain indemnification from the party primarily responsible for the defect; the court, however, did not permit such a result. Instead, it found "that there is little rational justification for this statute [since] the effect here is to give special and unusual immunities to the class referred to in the statute as persons 'performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property.' "[25]

The court in *Kallas* listed several reasons for declaring the completion statute unconstitutional. First, the statute unreasonably granted immunity to a special class of defendants thereby denying other defendants equal protection of the laws.

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23. *See* Cohen v. Towne Realty, 54 Wis. 2d 1, 194 N.W.2d 298 (1971) and Rosenthal v. Kurtz, 62 Wis. 2d 1, 213 N.W.2d 741 (1974).

24. 66 Wis. 2d 382, 225 N.W.2d 454 (1975).

25. *Id.* at 388, 225 N.W.2d at 458.

Second, the court found that the statute may deprive a plaintiff of a remedy for a wrong under article I, section 9 of the state constitution. Since both of these grounds, equal protection and a remedy for a wrong, may have an impact on Wisconsin's new completion statute, it is necessary to state in some detail not only the Wisconsin Supreme Court's reasoning as to each basis but that of courts in other jurisdictions as well.

A. Equal Protection

In *Kallas,* the court stated a two-part test for finding legislation invalid under the equal protection clause. First, it must be determined whether the statute singles out a group to be protected while excluding others.[26] As has been demonstrated, Wisconsin's first completion statute clearly had this effect. Second, "only if the classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will the classification be held violative of constitutional guarantees of equal protection."[27] The court, reiterating many of the policy arguments mentioned earlier, found no substantial distinctions that made the protected class different from the class not so protected.[28]

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26. *Id.*

27. *Id.* The *Kallas* court cited Dane County v. McManus, 55 Wis. 2d 413, 198 N.W.2d 667 (1972), which listed five criteria which a classification must satisfy:

> (1) All classifications must be based upon substantial distinctions which make one class really different from another.
>
> (2) The classification adopted must be germane to the purpose of the law.
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> (3) The classification must not be based upon existing circumstances only . . . . It must not be so constituted as to preclude addition to the numbers included within a class.
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

55 Wis. 2d 413, 423, 198 N.W.2d 667, 672-73 (1972). *See also* State *ex rel.* Baer v. City of Milwaukee, 33 Wis. 2d 624, 148 N.W.2d 21 (1967); State *ex rel.* Ford Hopkins Co. v. Mayor of Watertown, 226 Wis. 215, 276 N.W. 311 (1937).

28. In Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973), the Hawaii Supreme Court succintly stated the rationale for invalidating a completion statute on equal protection grounds:

> The statute on one hand grants immunity to the engineer and the contractor, who should and would be, but for the statute, primarily responsible . . . . On the other hand, the owners are burdened with the liability for damages proxi-

the necessity of declaring section 893.155 unconstitutional, noted that the Illinois completion statute[36] had been held unconstitutional as special legislation prohibited by the Illinois Constitution.[37] The court pointed out that the Wisconsin statute might be similarly infirm under article I, section 9 of the Wisconsin Constitution.[38]

The *Rosenthal* court suggested that the reason for an article I, section 9 attack is a conflict between the reading of section 893.14, the prefatory section for the limitations statutes which provides that in each of the limitations specified a right of action exists, and section 893.155, which states that no action may be brought more than six years after substantial completion of construction. Since section 893.14 is a legislatively recognized right, the completion statute may bar a

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legislature if we did not point out the extremely shaky constitutional and statutorily anomalous underpinnings of the statute." 62 Wis. 2d at 11, 213 N.W.2d at 746. *Contra,* Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971), wherein the court found the completion statute not to be in contravention of the Oregon Constitution, article I, section 10, which provides that "[e]very man shall have remedy by due course of law for injury done him in his person, property or reputation."

35. 62 Wis. 2d 1, 213 N.W.2d 741 (1974).

36. ILL. ANN. STAT. ch. 83, § 24f (Smith-Hurd 1966) (repealed 1969).

37. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967). In declaring the statute constitutional, the court stated:

> [T]he statute singles out the architect and the contractor and grants them immunity. It is not at all inconceivable that the owner or person in control of such an improvement might be held liable for damage or injury that results from a defective condition for which the architect or contractor is in fact responsible. Not only is the owner or person in control given no immunity; the statute takes away his action for indemnity against the architect or contractor.
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> The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years [the Illinois time period] after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted.

Id. at 460, 231 N.E.2d at 591.

38. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformable to the laws.

WIS. CONST. art. I, § 9.

claim before a cause of action has accrued under section 893.14.[39]

At the outset of the opinion in *Kallas* the court stated that "the statute [section 893.155] deprives a plaintiff of a remedy for a wrong that is recognized by the laws of the state. The statute is therefore . . . unconstitutional under art. I, sec. 9, of the Wisconsin Constitution."[40] However, once the court found an equal protection violation, no further discussion of a remedy for a wrong was provided. In fact, the court seemed to retreat from the forthright statement made initially when it stated: "While we find arguable merit in the argument we posed in *Rosenthal, i.e.,* that sec. 895.155 . . . denies a remedy for a legislatively recognized right under art. I, sec. 9, of the Wisconsin Constitution, we do not rest our decision on that aspect of possible unconstitutionality."[41] Because of this, the *Rosenthal* dictum remains the best indication of possible infirmities of the completion statute on this state constitutional ground.

The court in *Kallas* did, however, cite a 1902 case, *Diana Shooting Club v. Lamoreux,*[42] as another source of authority for attacking the completion statute on these constitutional grounds. *Diana Shooting Club* involved an action to recover damages from a hunter who had trespassed upon the plaintiff's property. Addressing the issue of whether an action involving only nominal damages could be maintained, the court concluded that the constitution guaranteed a remedy for every wrong, stating that "[e]very person has a constitutional right to the exclusive enjoyment of his own property for any purpose which does not invade the rights of another person."[43]

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39. This inequity can be illustrated by the facts in *Kallas,* where the plaintiffs, adjacent property owners to Square D, suffered injury when the defendant's high pressure water system ruptured. Prior to this rupture and water damage, the plaintiffs had no cause of action. In fact, as to Grinnell, the installer of the water line, plaintiffs could not have brought suit before their injury even if they knew of a defect in design since it was the defendant's property. Once the plaintiff had suffered an injury and brought suit against Grinnell, section 893.155 became operative and barred the suit even though under section 893.14 the cause of action did not accrue until the rupture. Since section 893.155 operated to bar the claim, plaintiffs would have suffered a wrong without a remedy.

40. 66 Wis. 2d at 384, 225 N.W.2d at 455-56.

41. *Id.* at 393, 225 N.W.2d at 460 (footnote omitted).

42. 114 Wis. 44, 89 N.W. 880 (1902) (cited in *Kallas* at 66 Wis. 2d at 393, 225 N.W.2d at 460).

43. 114 Wis. at 59, 89 N.W. at 886.

The *Diana Shooting Club* case may have important implications. First, the case dealt with the common-law action of trespass. Second, the opinion stated that article I, section 9 guaranteed a remedy for this common-law right. Finally, it should be remembered that the water damage suffered in *Kallas* constituted a trespass by the adjacent property owner. Thus, the court in *Kallas* may well be suggesting that the completion statute is void not only because it denies a legislatively recognized right but also because it denies a right recognized at common law.

A case which directly confronts the issue of whether the legislature may act in creating a limitations statute in derrogation of a claim recognized at common law is *Saylor v. Hall.*[44] This case may also illustrate why the Wisconsin court was unwilling to discuss this issue further once it had found an equal protection violation. The case is particularly appropriate since both the completion statute[45] and the constitutional section[46] parallel the statute and constitutional section at issue in *Kallas.*

Saylor involved an action for the wrongful death of plaintiff's son and for personal injuries of a second son caused by the collapse of a stone fireplace constructed by the defendant. Although the evidence showed that defendant had installed the fireplace braces in a negligent manner, the trial court found that the action was barred by the Kentucky completion statute. On appeal, plaintiffs alleged that the legislature had no power to extinguish common-law rights based on negligence actions. The Kentucky court, citing *Silver v. Silver,*[47] which dealt with the constitutionality of auto guest statutes, noted that the Supreme Court had held that Congress had the power to abolish old rights recognized at common law. By analogy, the court noted it was within the province of the legislature to validate workmen's compensation laws and automobile guest-passenger statutes, both of which abrogated certain common-law rights. However, the state constitution had

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44. 497 S.W.2d 218 (Ky. 1973).

45. KY. REV. STAT. § 413.135 (1969).

46. KY. CONST., § 14, which provides: "All courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right in justice administered without sale, denial, or delay."

47. 280 U.S. 117 (1929).

long been construed as prohibiting the legislative branch from abolishing common-law negligence. Further, Kentucky was a state that had invalidated a guest-passenger statute[48] because of a conflict with the state constitution. Accordingly, the court hesitantly stated that "these statutes cannot be applied to bar the claims that are the subjects of this action. Our holding, however, is confined to that specific decision."[49] The court, in limiting its decision, was able to avoid broad constitutional questions. Further, it stated it did not care to confront the debate concerning substantive due process versus procedural due process, which a broad analysis of the legislative role in enacting a completion statute that abrogates common-law rights would certainly entail. While recognizing the legislature's power to enact statutes of limitation, the court stated it was equally well settled that the legislature could not abolish existing common-law actions based on negligence. Thus, it concluded that the statute could not be applied to bar plaintiff's claim in this case.

The court in *Saylor* did not, however, completely invalidate the state's completion statute. It would seem that the Kentucky statute, as a procedural statute, (that is, one which merely limits the time for bringing an action when plaintiffs are aware of their injury) would be a valid limitations statute. However, when the statute affects substantive rights by barring any claim at all, it would seem to be constitutionally defective. A completion statute has such a substantive effect when the cause of action does not accrue until after the period defined in the statute has passed.

While *Kallas* suggested, at least indirectly by citing *Diana Shooting Club,* that article I, section 9 guaranteed remedies as to unlawful trespass, other common-law actions such as negligence might similarly be protected *at least* to the extent of constitutional safeguards from legislation couched in procedural terms which have substantive effects as to rights of action. However, several other jurisdictions faced with similar issues have found no state constitutional violations.[50] Judging from

48. Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932).

49. 497 S.W.2d at 220.

50. *See, e.g.,* Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976) (holding that the legislature did not interfere with a vested right but simply cut off the right to

the hesitancy of the Wisconsin court to rest on these grounds, the narrow finding of the Kentucky court and the refusal to invalidate at all by other jurisdictions, it seems unlikely that the remedy for a wrong approach will have any far reaching implications. At best, its usefulness would appear to be limited to specific factual findings on a case-by-case basis.[51]

C. *The Amended Completion Statute*

Subsequent to the invalidation of the state's first completion statute, section 893.155 was amended to read as follows:

> No action to recover damages for any injury to property, or for an injury to the person, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, land surveying, planning, supervision of construction, materials or construction of such improvement to real property, more than 6 years after the substantial completion of construction. If the injury or defect occurs or is discovered more than 5 years but less than 6 years after the substantial completion of construction, the time for bringing the action shall be extended 6 months.[52]

The statute as amended effectuated a number of changes. First "land surveying" and "materials"[53] were added to the list of services which might be performed as an improvement

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sue); Loyal Order of Moose, Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) (court found an equal protection violation but could find no support for the contention that the statute denied a remedy for a wrong). *But see* Ciancio v. Serafini, 574 P.2d 876 (Colo. App. 1977) (holding that a statute in derogation of a common-law right of action must be strictly construed).

51. The court in *Rosenthal* also hinted that the Wisconsin completion statute "overstepped the bounds of due process in varying degrees." 62 Wis. 2d at 11, 213 N.W.2d at 746. Although the court did not discuss a due process violation in any detail, it suggested that the violation was in the way the statute specifically protected architects and builders. Finally, the court stated that it could be compelled to invalidate the statute in a subsequent case since its denial of "property, *i.e.*, a cause of action recognized by law, could well run afoul of the fourteenth amendment of the United States Constitution." *Id.* at 12, 213 N.W.2d at 746.

52. WIS. STAT. § 893.155 (1977). *See also Limitation of Action Statutes for Architects and Builders, supra* note 1, at 361, where it is suggested that changes to cure the defective statute were made.

53. *See* Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1974) (court found equal protection denied because materialmen were excluded).

to property.[54] Second, the amended statute substituted the words "substantial completion" and deleted the words "performance or furnishing of such services." Third, the new statute omitted the sentence which previously made the statute inapplicable to owners or persons in control.[55] Last, a provision was added allowing an extension of six months if the injury occurred more than five but less than six years after completion.[56]

The major question is whether these amendments correct the defects which caused the first completion statute to be declared unconstitutional. The primary basis of invalidation was a denial of equal protection to certain classes of defendants under the statute. On the face of the new statute, materialmen and land surveyors have been added to the list of those protected. At first glance, it may appear that owners and those in control of property, now no longer explicitly excluded on the face of the statute, may also come under the protective umbrella. This is not the case, however. First, the statute states that no action will be brought "arising out of the defective and unsafe condition of an improvement to real property"[57] as to those who "perform or furnish"[58] such improvements. Nor may an action for contribution or indemnity be brought against these same persons. Clearly, owners or those in control of property are not included, unless perhaps they also performed one of the functions listed, in which case there might be a question as to whether the statute would be applicable. Second, the statement of legislative intent published along with the statute in chapter 335 specifically states that "[t]his act shall not deprive any person of any rights or reme-

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54. While furnishing materials is now included, it would seem manufacturers would not be included. *See* text following note 104 *infra*.

55. 1975 Wis. Laws ch. 335. Deleted words are: "This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action."

56. The grace period cures the defect illustrated in *Cohen*, where the plaintiffs brought suit just five months before the statute barred the action as to the architects. Defendants failed to act soon enough to bring in the architects and were thus barred by the completion statute. Supposedly, the defendants would have had an additional six months under the amended statute to act.

57. 1975 Wis. Laws ch. 335.

58. *Id.*

dies such persons may have against persons other than those enumerated in this act . . . ."[59] The statute, therefore, still protects a class of defendants. The amendments do not cure the defect discussed in *Kallas* as to a denial of equal protection. In fact, it made no change at all in this regard.

It may be that the legislature was well aware of the fact that the amendments did little to change the statute because of the extensive findings and statement of intent that were published as a preface to the statute.[60] However, it is an elementary rule of statutory construction that if a statute is unconstitutional on its face, the fact that a legislature's purpose and motive are legitimate will not save the statute.[61]

In summary, the new completion statute is really the old completion statute. The equal protection defect remains. It may reasonably be assumed, then, that if the supreme court is confronted with a statute of limitations defense based on the amended section it would again declare the statute void.

III. INTERIM CASES

After Wisconsin's first completion statute was declared unconstitutional, but before the legislature enacted a second

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59. *Id.* at § 2(b).

60. The Wisconsin Legislature made the following statement of intent:

(1) Findings. The legislature finds that:

(a) Subsequent to the completion of construction persons involved in the planning, design and construction of improvements to real estate lack control over the determination of the need for, the undertaking of and the responsibility for maintenance, and lack control over other forces, uses and intervening causes which cause stress, strain, wear and tear to the improvements and in most cases have no right or opportunity to be made aware of or to evaluate the effect of these forces on a particular improvement or to take action to overcome the effect of these forces.

(b) It is in the public interest to set a point in time following the substantial completion of the project after which no action may be brought for errors and omissions in the planning, design and construction of improvements to real estate, whether these errors and omissions have resulted or may result in injury or not. This legislation is determined to be in the public interest and in the interest of equating the rights to due process between prospective litigants in the area of planning, design and construction of improvements to real property in an equitable manner.

1975 Wis. Laws ch. 335.

61. 1 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 2.06 (4th ed. 1972). "If a statute is incapable of any valid application or if its very existence has an intimidating effect tending to inhibit the exercise and enjoyment of constitutionally protected freedoms, it is held to be invalid on its face and wholly void." *Id.* (footnote omitted).

completion statute, a number of cases raised the issue of the proper statute of limitations for actions against parties who had designed or furnished improvements to property. These "interim" cases are important for two reasons. First, they remain precedent for claims brought prior to 1976.[62] Second, and more importantly, if the new statute is still constitutionally defective, these interim cases will be precedent for all such claims.

In *Abramowski,* the plaintiffs argued that since section 893.155, Wisconsin's first completion statute, had been found unconstitutional, there was no limitation period for such claims. The defendant countered that under either section 893.13(3) or 893.19(5) the statute of limitations had run. The court, after finding section 893.19(3) inapplicable because of the absence of a contract claim, held that since section 893.19(5) had applied to actions involving improvements to real property before the enactment of Wisconsin's first completion statute,[63] it would again be applicable.

Like the invalidated completion statute, section 893.19(5) has a limitation period of six years. The significant difference is that under a completion statute, the time begins to run from the completion of the improvement, whereas under section 893.19(5), the time for bringing a claim runs from the time a cause of action accrues under section 893.14.[64] The Wisconsin Supreme Court has held that "[a] cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it."[65] The court in *Abramowski* accepted plaintiff's contention that no cause of action could accrue until an injury had occurred. In support of this, the court relied on another interim case, *Hartford Fire Ins. Co. v. Osborn Plumbing.*[66]

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62. *Kallas* found section 893.155 unconstitutional in 1974. The statute was amended by 1975 Wis. Laws ch. 335. The effective date was June 13, 1976. *See also* Shaurette v. Capitol Erecting Co., 23 Wis. 2d 538, 128 N.W.2d 34 (1964) (holding that the first completion statute did not operate retroactively).

63. Abramowski v. Wm. Kilps Sons Realty, Inc., 80 Wis. 2d 468, 239 N.W.2d 306 (1977). *See also* Shaurette v. Capitol Erecting Co., 23 Wis. 2d 538, 128 N.W.2d 34 (1964).

64. WIS. STAT. § 893.14 (1977).

65. Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 168 N.W.2d 177 (1968).

66. 66 Wis. 2d 454, 225 N.W.2d 628 (1975).

Hartford involved an action for an injury to property by a fire caused by a negligently installed water heater. The insurance company brought a subrogation suit against the architect that had approved the plan. The architect moved for summary judgment setting forth an affirmative defense based on the statute of limitations, section 893.19(5); the trial court granted the motion, reasoning that the injury occured when the heater was installed.[67] On appeal, the supreme court stated that the installation of a heater could not be viewed as an injury, rather, "[b]oth the act of negligence and the fact of resultant injury must take place before a cause of action founded on negligence can be said to have accrued."[68]

Two recent appellate court cases have further defined when there is an injury sufficient for the bringing of an action. In the first of these, *Tallmadge v. Skyline Construction, Inc.*,[69] plaintiffs, second owners of a twenty-four unit apartment building, brought suit alleging negligent planning and construction. The trial court granted defendant's motion for summary judgment since it found that the action had not been commenced until more than six years after the action had accrued. On appeal, the plaintiff argued that the supreme court had never decided the magnitude of injury necessary for the bringing of an action. The court, after noting that injury and negligent act do not necessarily coincide, suggested that "when the evidence of injury to property . . . is sufficiently significant to alert the injured party to the possibility of a defect,"[70] a sufficient injury has been sustained to start the running of the limitations period. The test appears to involve a factual determination as to whether an injury was "sufficiently significant" to put an injured party on notice. The court added that "[t]he injury need not . . . be of such magnitude as to identify the causal factor."[71] This is a curious statement; if

67. The rule that an injury occurs at the time of the negligent act is applied in legal and medical malpractice cases. *See* Boehm v. Wheeler, 65 Wis. 2d 668, 223 N.W.2d 536 (1974); Olson v. St. Croix Valley Memorial Hosp., 55 Wis. 2d 628, 201 N.W.2d 63 (1972).

68. 66 Wis. 2d at 462, 225 N.W.2d at 632. *See also* Rosenthal v. Kurtz, 62 Wis. 2d 1, 213 N.W.2d 741 (1974), wherein the court stated that a cause of action accrues when an injury occurs.

69. 86 Wis. 2d 356, 272 N.W.2d 404 (Ct. App. 1978).

70. *Id.* at 359, 272 N.W.2d at 405.

71. *Id.*

a party is unaware of the cause of his injury how can that party determine against whom the claim should be brought? The very definition of an accrual of a cause of action requires that there be "a suable party against whom [the claim] may be enforced."[72] Therefore, it would seem that the party should at least be able to ascertain the cause of his injury.

The second case, *Crawford v. Shepherd,*[73] involved an action by a plaintiff-owner of an apartment complex against defendants-architects, who had designed the unit. The complex was designed in March of 1968; the roof began to rot and leak in 1974. The architects moved for summary judgment alleging the statute of limitations barred plaintiff's claim. The trial court denied the motion and the appellate court affirmed, stating that "in architectural negligence cases, the statute of limitations begins to run when the injury, not the negligence occurs."[74] Further, the court stated that the running of the statute depends on the evidence of the injury. *Tallmadge,* like *Crawford,* suggests that the occurence of an injury is a question of fact. In cases such as these, then, it would appear that summary judgment motions based on a statute of limitations defense will not often be granted since there will be, in most instances, a factual question as to whether a plaintiff was sufficiently on notice of the injury.

IV. The California Approach

In *Kallas,* the court stated that in order to withstand equal protection scrutiny it must be established that substantial distinctions exist which make the protected class truly different from that which is not so protected.[75] The question becomes one of looking for the distinction that will tip the scale in favor of protecting a class. The most important factor seems to be that of time; the existence of a *substantial distinction* is thus a function of the time interval. The arguments in favor of barring suit against those performing services to improve property become more substantial the longer it has been since those services were completed. On the other hand, if a relatively

72. *See* text accompanying note 8 *supra.*
73. 86 Wis. 2d 362, 272 N.W.2d 401 (Ct. App. 1978).
74. *Id.* at 368, 272 N.W.2d at 403.
75. 66 Wis. 2d at 388-89, 225 N.W.2d at 458.

short time has passed the reasons opposing a statute barring claims against a favored class are considerable when a defendant-owner is subject to liability without having an opportunity to get indemnification from the party primarily responsible for the injury.

The time factor is important because of the existence of latent defects. Without latent defects, a simple procedural limitations statute could be devised defining the time within which a plaintiff must bring an action once the injury has become apparent. But because of latency, the completion statute, at times, creates a pseudo-limitations[76] statute which extinguishes substantive rights. As has been mentioned however, a number of policy considerations demand that builders and architects receive special protection. The problem, then, is one of devising a statute which provides for the special problems of builders and architects and yet treats all defendants fairly.

As had been suggested above, in order for a completion-type statute to be constitutionally antiseptic it must take into consideration both the time factor and the distinction between patent and latent defects. Several states have in fact adopted this approach. California, for example, has two distinct statutes delineating periods of limitation on the basis of whether a defect is patent or latent.

As to patent defects, no action can be brought in California against "any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement . . . ."[77] Expressly excluded from the stat-

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76. *See* the dissent in *Howell,* 90 N.M. at ___, 568 P.2d at 226, wherein the dissenting justice stated the completion statute "is not a statute of limitations. It is 'an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.'" The dissent agreed with the finding in *Kallas* as to finding an equal protection violation. *Id.* at ___, 568 P.2d at 230.

77. The full text reads as follows:

(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement

ute's operation are owner-occupied, single-family dwellings[78] and persons in possession or control of the property. As to latent defects, the California statute provides that no action can be brought against "any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than ten years after the substantial completion of such development or improvement . . . ."[79] Persons in possession or con-

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to, or survey of, real property;

(2) Injury to property, real or personal, arising out of any such patent deficiency; or

(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.

(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.

CAL. CIV. PROC. CODE § 337.1 (West Supp. 1978).

78. *Id.* The Wisconsin Legislature might consider such an exclusion in light of the statutory warranty provided by Wis. Stat. § 706.10(a) (1977), and by Home Owners Warranty Insurance coverage. *See* Comment, *Builder-Vendor Liability for Construction Defects in Houses*, 55 MARQ. L. REV. 369 (1972).

79. California's latent defect statute provides:

(a) No action may be brought to recover damages from any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of such development or improvement for any of the following:

(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

(2) Injury to property, real or personal, arising out of any such latent deficiency.

(b) As used in this section, "latent deficiency" means a deficiency which is

trol of an improvement are expressly excluded from the operation of the statute. In effect, the statute provides that no latent defect can exist with respect to construction after the passage of ten years.[80] Thus, after ten years it becomes the sole duty of an owner to inspect and make safe the premises and to bear any losses from injuries to third parties.[81]

Although California has a four- and ten-year limitation period as to patent and latent defects, respectively, other states with such statutes have used shorter limitations periods.[82] However, the Wisconsin legislature, if it should choose to adopt a patent-latent statute, may do well to adopt a ten-year statute for latent defects. First, a shorter period, such as six years, may prove vulnerable in view of the Wisconsin Supreme Court's invalidation of the state's first completion statute. Second, the ten-year period is supported by a study which has shown that 99.6% of all claims are brought within ten years after completion of construction.[83] As to the time period for

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not apparent by reasonable inspection.

(c) As used in this section, "action" includes an action for indemnity brought against a person arising out of his performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed pursuant to Section 442 in an action which has been brought within the time period set forth in sub-division (a) of this section.

(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.

(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in such improvement constitutes the proximate cause for which it is proposed to bring an action.

CAL. CIV. PROC. CODE § 337.15 (West Supp. 1978).

80. After ten years, it might be just as likely that deficiencies are caused by lack of upkeep and weathering. The evidentiary problem discussed earlier would thus take on increased emphasis.

81. *Contra,* Fujioka v. Kam, 55 Hawaii 7, ___, 514 P.2d 568, 570 (1973) (finding the Hawaii patent-latent statute providing a two-year or a ten-year period in contravention to equal protection guarantees although the specific defect related to the omission of materialmen).

82. HAWAII REV. STAT. § 657-8 (1976) (two-year and six-year periods); MASS. GEN. LAWS ANN. ch. 260 § 2B (West 1978) (three-year and six-year periods); NEB. REV. STAT. § 25-223 (Cum. Supp. 1978) (four-year and ten-year periods).

83. *Limitation of Action Statutes for Architects and Builders, supra* note 1, at 367 (reporting Hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Comm. on the District of Columbia, 90th Cong., 1st Sess. 28 (1977)).

The study, based on 570 random suits against architects, found that 37.1% of all claims were brought within one year, 56.3% within two years, 73.1% within three

patent defects, a period shorter than six years could be considered. Since plaintiffs now have only three years to bring suit in negligence actions for personal injuries,[84] it would seem logical that a longer period should not be provided for injuries to real property. For these reasons, the Wisconsin legislature should consider adopting a patent-latent statute of limitations for injury to real property with a three- to ten-year limitations period that runs from the time an improvement is completed.

The Massachusetts patent-latent statute[85] provides for bringing claims within three years from the time a cause of action accrues, but in no event can an action be brought more than six years after completion. The advantage of this statute is that the period of limitation for bringing claims is uniformly defined. The California model, on the other hand, allows a ten-year limitation period for latent defects regardless of whether the defect was apparent four or nine years after completion. However, in support of the California approach, latent defects are often injuries which appear gradually, and, as the *Crawford*[86] and *Tallmadge*[87] cases illustrate, courts may have difficulty in determining whether a party had notice of his injury in latent defect cases. For this reason, the California model appears to be easier to apply.

V. Product Liability Confusion

Another consideration as to whether a completion statute, if one could be validly constructed, should be created is the broad application these statutes have been given in the past — often well beyond the scope the legislature may have in-

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years, 84.3% within four years, 89.7% within five years, 93% within six years, 97.9% within seven years, 98.7% within eight years, 99.2% within nine years and 99.6% within ten years.

While 93% of claims had been made within six years (the present limitations period defined by section 893.155) 6.6% or 38 claims were made after the six-year period. As illustrated by *Crawford* and *Tallmadge*, notice of a latent defect is difficult to pinpoint. Since claims were made continually for ten years, the argument can be made that the claims resulted from latent injuries. No claims were brought eleven and twelve years after completion. One claim was brought in each of the thirteenth and fourteenth years. *Id.*

84. Wis. Stat. § 893.205 (1977).

85. Mass. Gen. Laws Ann. ch. 260 § 2B (West 1973).

86. Crawford v. Shepherd, 86 Wis. 2d 362, 272 N.W.2d 401 (Ct. App. 1978).

87. Tallmadge v. Skyline Constr., Inc., 86 Wis. 2d 356, 272 N.W.2d 404 (Ct. App. 1978).

tended. Some applications have been in cases involving roof collapse,[88] negligent installation of insulation,[89] negligent construction of a fire place,[90] negligent design of ventilation,[91] defective garage door operation,[92] inaccurate survey[93] and basement collapse.[94] All of these cases would appear to be the type of improvement to property the completion statute was designed to cover. But the completion statute has also been applied in the following cases: defective fastening of overhead monorail track in factory,[95] negligent construction of high pressure water system,[96] a defective elevator[97] and a defective conveyor system.[98] Arguably, these latter cases are demonstrative of product liability claims and thus should not have been governed by completion statutes. Since an item can become affixed to real property, manufacturers may have a convenient bar to claims depending on whether the defectively manufactured product is deemed to be a fixture.

Two Virginia federal district court cases provide an excellent example of problems in this area. In *Wiggins v. Proctor & Schwartz, Inc.*,[99] which involved an action against a manufacturer of a machine, the defendant asserted that plaintiff's claim was barred because of the Virginia completion statute.[100] After first determining that the machine was a fixture, the court stated that the statute should be given a reasonably liberal interpretation and that the words "construct" and "man-

88. Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971).

89. Freezer Storage, Inc. v. Armstrong Cork Co., 234 Pa. Super. 441, 341 A.2d 184 (1975), *aff'd*, 476 Pa. 270, 382 A.2d 715 (1978).

90. Saylor v. Hall, 497 S.W.2d (Ky. 1973).

91. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

92. Broome v. Trulucki, 270 S.C. 227, 241 S.E.2d 739 (1978).

93. Ciancio v. Serafini, 574 P.2d 867 (Colo. App. 1977).

94. Abramowski v. Wm. Kilps Sons Realty, Inc., 80 Wis. 2d 468, 259 N.W.2d 306 (1977).

95. Schaurette v. Capitol Erecting Co., 23 Wis. 2d 538, 128 N.W.2d 34 (1964).

96. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1974).

97. Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971).

98. Plant v. R.L. Reid, Inc., 294 Ala. 155, 313 So. 2d 518 (1975).

99. 330 F. Supp. 350 (E.D. Va. 1971).

100. VA. CODE § 8-24.2 (1950). The Virginia completion statute is similar to section 893.155 before it was amended in 1975.

ufacture" are synonymous.[101] Therefore, the statute applied to bar plaintiff's claim.

In *Smith v. Allen-Bradley Co.*,[102] the plaintiff, in the course of his employment, had both of his hands crushed because of an allegedly faulty limit switch on a press. The defendant-manufacturer set forth an affirmative defense based on the Virginia completion statute. Noting that the completion statute was enacted "at the behest of architects, designers, engineers and building contractors,"[103] the plaintiff argued that the statute "was never meant to apply to manufacturers of chattels which become improvements to realty."[104] The court, however, found itself constrained to follow the precedent set out in *Wiggins,* and thus held that the plaintiff's suit was barred.

Fortunately, the problem encountered by the plaintiff in *Smith* has not arisen directly in Wisconsin. It might be pointed out, however, that the court may have flirted with this problem in *Kallas,* where it was found that a high pressure water system was an improvement to property as a matter of law. It is hoped, that if the legislature does create a special statute of limitations for products liability cases, that it would do so in light of the problems unique to those types of claims. The completion statute clearly should not be applicable to products liability claims. Finally, if the legislature decides to adopt a patent-latent statute, it should be made clear that construct is not synonymous with manufacture.

VI. Conclusion

The question of the enactment of a special completion statute to protect those who furnish the design or improvement to real property should be considered in light of past controversies. The inequality of treatment among classes of defendants has at times proven to be inequitable. Not surprisingly, Wisconsin's first completion statute was found violative of equal protection guarantees. Since section 893.155, as amended, has the same constitutional defects as its predeces-

101. 330 F. Supp. at 353.
102. 371 F. Supp. 698 (W.D. Va. 1974).
103. *Id.* at 699.
104. *Id.* at 700.

sor, it can be expected that a court faced with the statute as a defense will again declare it unconstitutional. If so, the interim cases will continue to be precedent and the appropriate period of limitations for claims arising out of injury to property would be defined by section 893.19(5), which provides a six-year period from the time a cause of action has accrued.[105]

As has been demonstrated, however, difficulties — most notably the "long-tail" and notice of injury problems — exist in the absence of a completion statute. It is suggested, then, that the Wisconsin legislature reexamine the policy considerations both for and against a completion statute. Applying a balancing test, the scale appears to tip to one side or the other depending on the number of years that have passed since completion of the improvement. For this reason, a patent-latent statute such as the California model should be considered. Such a statute, while giving due regard to the special needs of builders and architects, would also treat most defendants, as well as plaintiffs, in a fair and equitable manner.

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105. The most recent interim case is Hunter v. School Dist. of Gale-Ettrick-Trempealeau, 90 Wis. 2d 523, 280 N.W.2d 313 (Ct. App. 1979). The court refused to apply the amended completion statute since the action accrued before reenactment. The court held that an existing cause of action is a vested right protected by the due process clause.